

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED BY Cg D.C.
05 AUG 11 AM 9:18

THOMAS M. GOULD
CLERK, U.S. DISTRICT COURT
WD OF TN, MEMPHIS

ELLIPSIS, INC.,

Plaintiff,

vs.

THE COLOR WORKS, INC.,

Defendants.

No. 03-2939-B/V

THE COLOR WORKS, INC.,

Third-Party Plaintiff

v.

MARY ELIZABETH WADE,
a/k/a Elizabeth Wade,
Individually,

Third-Party Defendant

ORDER DENYING PLAINTIFF'S AND THIRD-PARTY DEFENDANT'S MOTION
TO EXTEND RULE 16(b) SCHEDULING ORDER

Before the court is the August 5, 2005 motion of the plaintiff, Ellipsis, Inc., and Third-Party Defendant Mary Elizabeth Wade, a/k/a Elizabeth Wade, to extend the deadlines of the June 27, 2005 Rule 16(b) Scheduling Order. This motion has been referred to the United States Magistrate Judge for determination. The request to extend the deadlines of the scheduling order was a part of a motion that also requested that the court enter an order compelling

This document entered on the docket sheet in compliance
with Rule 58 and/or 79(a) FRCP on 8-11-05

157

the defendant, The Color Works, Inc., to file additional responses to Ellipsis, Inc.'s, and Mary Elizabeth Wade's second set of interrogatories and requests for production of documents. On August 8, 2005, the defendant, The Color Works, Inc., responded only to the motion to extend the Rule 16(b) Scheduling Order. The time for responding to the motion to compel has not passed. The Color Works, Inc. indicates in its opposition to the present motion that a response to Ellipsis' motion to compel is forthcoming. Therefore, the court will handle the motions individually and will enter separate orders on each motion at the appropriate time.¹² For the following reasons, the motion to extend the Rule 16(b) Scheduling Order is denied.

Federal Rule of Civil Rule 16(b) provides that "[a] schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge." FED. R. CIV. P. 16(b). "The primary measure

¹ In its response to the motion, The Color Works Inc. requests that the court enforce an agreement made between its counsel and former counsel for Ellipsis, Inc. to pay/reimburse Messrs. Gross and Sammataro for their airfare and hotel room expenses incurred in association with depositions that were scheduled to have taken place in Greensboro, North Carolina on June 14 and 15, 2005. The court will not address this issue as Ellipsis Inc. has not had an opportunity to respond. The Color Works, Inc. may re-file its request at a later date if the matter is not resolved.

of Rule 16's 'good cause' standard is the moving party's diligence in attempting to meet the case management order's requirement." *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 625 (6th Cir. 2003) (quoting *Bradford v. Dana Corp.*, 249 F.2d 604, 609 (8th Cir. 2001)). Thus, an extension should not be granted unless the deadline could not reasonably be met "despite the diligence of the party seeking the extension." *Leary v. Daeschner*, 349 F.3d 888, 906 (6th Cir. 2003). Prejudice to the non-moving party as a result of the proposed schedule modification is another relevant consideration. *Inge*, 281 F.3d at 625.

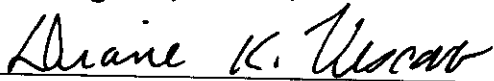
This case was filed in December of 2003. A trial date has been set for March 20, 2006. The original scheduling order was entered on February 17, 2004. Since that time, the scheduling order has been modified on numerous occasions. Ellipsis, Inc. and Elizabeth Wade now request that the court modify the scheduling order once again. They contend that an extension of an additional sixty (60) days to every date listed in the most recent modified scheduling order is necessary in order for them to appropriately prepare for trial. As the basis for their requests, they allege that with the recent appearance of new counsel on July 11, 2005, additional time to review the file and to obtain supplemental responses to interrogatories and requests for production of documents is needed in order to meet the court's present trial

date.

Despite the fact that Ellipsis, Inc. and Elizabeth Wade just recently retained new counsel in this matter, the court finds that they have not exercised diligence in attempting to meet the most recent scheduling order's deadlines. Thus, they have failed to establish good cause for modifying the scheduling order as required by Rule 16(b) of the Federal Rules of Civil Procedure. What is particularly alarming to the court is the fact that new counsel, despite making an appearance on June 12, 2005, waited until August 5, 2005 to file a motion seeking additional time to prepare its case. It appears that an entire month passed without any attempt on the part of new counsel to act diligently in the face of pending deadlines. Moreover, Ellipsis and Wade provide no explanation as to why the current deadlines cannot be met. As pointed out by The Color Works, Inc., the only pressing deadlines are the September 9, 2005 fact discovery deadline and the October 7, 2005 deadline for providing rebuttal expert disclosures/reports. The court finds that with any amount of effort, counsel for Ellipsis and Wade should be able to meet these deadlines.

Accordingly, Ellipsis, Inc.'s and Elizabeth Wade's motion to extend the Rule 16(b) scheduling order is denied. All deadlines from the July 27, 2005 scheduling order remain in effect.

IT IS SO ORDERED this 10th day of August, 2005.



DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE



Notice of Distribution

This notice confirms a copy of the document docketed as number 157 in case 2:03-CV-02939 was distributed by fax, mail, or direct printing on August 11, 2005 to the parties listed.

Ashley Yarnell Baskette
SHUTTLEWORTH WILLIAMS, PLLC
200 Jefferson Ave.
Ste. 1500
Memphis, TN 38103--002

Kenneth R. Shuttleworth
SHUTTLEWORTH WILLIAMS HARPER WARING & DERRICK
200 Jefferson Ave.
Ste. 1500
Memphis, TN 38103--630

James G. Sammataro
AKERMAN SENTERFITT
1 S.E. Third Ave.
28th fl.
Miami, FL 33131

Daniel Warren Van Horn
ARMSTRONG ALLEN, PLLC
80 Monroe Avenue
Ste. 700
Memphis, TN 38103--246

Merrick L. Gross
AKERMAN SENTERFITT
1 S.E. Third Ave.
28th Floor
Miami, FL 33131--171

Megan J. Knight
AKERMAN SENTERFITT
1 S.E. Third Ave.
28th Floor
Miami, FL 33131--171

Honorable J. Breen
US DISTRICT COURT